MIRZA MURTALA

v.

PP

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
ABU SAMAH NORDIN JCA
AZHAR MA'AH JCA
[CRIMINAL APPEAL NO: A-05-92-2007]
17 FEBRUARY 2010

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Whether accused framed up by prosecution's witnesses - Appellant shown to have requisite knowledge of nature of drugs involved - Possession of drugs by appellant proven - Appellant's intention to sell and deliver drugs proven - Defence of mere denial - Whether reasonable doubt raised on prosecution's case*

EVIDENCE: *Cross-examination - Suggestions made by defence counsel to prosecution's witnesses at prosecution's stage - Whether suggestions amount to evidence - Proposition unsupported by evidence and successfully refuted by prosecution*

On 28 April 2001, Det. Sgt. Zainal (SP6) received information from a source about drug trafficking activity by an Achehnese. Then, on 1 May 2001 SP6 received a telephone call from someone who identified himself as "Agus" (the appellant) who informed SP6 that he had obtained SP6's telephone number from the source. Agus requested SP6 to meet the source for more information. SP6 understood the information to mean that it was in relation to drug trafficking transaction. SP6 was informed by the informer that Agus was prepared to sell to SP6 ganja at RM1,700 per kilogram. Agus then called SP6 requesting for a meeting at a restaurant. An ambush party comprising of nine police personnel was mobilised. SP6 and another police officer (SP7) arrived at the said restaurant and met with Agus. After negotiating the price, SP6, SP7 and Agus drove to Flat Taman Pakatan, Bercham to collect the drugs. On arrival at Jalan Lengkok Bercham 4, Agus pointed to a male person (the second accused) with a sling bag sitting and leaning against the seat of a parked motorcycle. Agus told SP7 that the goods were inside the bag. SP7 unzipped the bag that was slung on the second

A accused and found the drugs. The raiding party then arrested Agus and the second accused. Both the accused were charged with trafficking in 4,934 grams of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act, 1952. The appellant claimed that he came to Ipoh to look for a job and whilst in Ipoh he met a man by the
B name of "Man". According to the appellant, "Man", told him that SP6 could help him get a job and therefore the appellant contacted SP6 hoping that SP6 could help him get a job. The appellant denied making any offer to sell drugs to SP6 and SP7. He also denied any knowledge of the drugs recovered from the bag carried
C by the second accused. The High Court judge found the appellant guilty as charged and upon conviction sentenced him to death whilst the second accused was acquitted and discharged. Hence, this appeal.

D **Held (dismissing the appeal and affirming the conviction and sentence)**
Per Azhar Ma'ah JCA delivering the judgment of the court:

(1) The evidence of SP6 was corroborated by SP7. In the cross-
E examination of SP6 it was put to him by learned counsel for the appellant that the discussions which the appellant had with SP6 was solely on the possibility of SP6 finding a job for the appellant and not about selling of drugs. Suggestions made to the prosecution's witnesses at the prosecution's stage by the
F defence are not evidence and remain mere suggestions. Hence, what was put to the witness SP6 was just a proposition unsupported by evidence and successfully refuted by the prosecution. (para 18)

(2) There was no evidence whatsoever at all of any reason or motive
G for the prosecution's witnesses aforesaid to frame up the appellant nor the 2nd accused. (para 21)

(3) The irresistible inference that could be drawn on the proved facts was that the appellant all along was privy to the
H transaction of the sale of the drugs in question that was found in the beg slung on the body of the second accused at the time of the arrest. The appellant had the requisite knowledge of the nature of the substance that he was dealing with and was in possession of the incriminating drugs. (para 23)

I

(4) The cannabis weighing 4,934 grams was well in excess of 200 grams. The appellant had the intention to sell and deliver the said drugs to SP6 and SP7, which he in fact delivered when he brought SP6 and SP7 to see the second accused. When SP7 asked him, "mana barang?", the appellant pointed to the second accused and said, "barang dalam beg". The appellant had not raised any reasonable doubt on the prosecution's case and his defence was a mere denial. (para 24)

Bahasa Malaysia *Translation Of Headnotes*

Pada 28 April 2001, Det. Sgt. Zainal (SP6) menerima maklumat dari satu sumber mengenai suatu aktiviti pengedaran dadah oleh seorang warga Aceh. Kemudian, pada 1 Mei 2001, SP6 menerima panggilan telefon dari seorang yang memperkenalkan dirinya sebagai "Agus" (perayu) yang memberitahu SP6 bahawa beliau memperolehi nombor telefon SP6 dari sumber di atas. Agus meminta SP6 untuk bertemu sumber bagi mendapatkan maklumat-maklumat lanjut. SP6 memahami maklumat lanjut tersebut sebagai bermaksud bahawa ia adalah berkaitan transaksi pengedaran dadah. SP6 kemudian diberitahu oleh pemberi maklumat bahawa Agus bersedia untuk menjual ganja kepada SP6 pada harga RM1,700 se kilogram. Seterusnya Agus menelefon SP6 meminta untuk menemuinya di sebuah restoran. Berikutan itu, sekumpulan pasukan serang hendap mengandungi sembilan anggota polis telah dimobilisasikan. SP6 dan seorang pegawai polis (SP7) telah pergi ke restoran dan berjumpa dengan Agus. Selepas tawar menawar harga, SP6, SP7 dan Agus menaiki sebuah kereta dan pergi ke Flat Taman Pakatan, Bercham untuk mengambil dadah. Sesampainya mereka di Jalan Lengkok Bercham 4, Agus menunjuk kepada seorang lelaki (tertuduh kedua) yang memegang satu beg galas dan sedang duduk menyandar pada tempat duduk sebuah motosikal. Agus memberitahu SP7 bahawa barang ada di dalam beg. SP7 membuka zip beg yang tergalas pada tertuduh kedua dan menjumpai dadah di situ. Pasukan serbuan kemudian menangkap Agus dan juga tertuduh kedua dan kedua-dua mereka dituduh dengan kesalahan mengedar 4,934 gram kanabis di bawah s.39B(1)(a) Akta Dadah Berbahaya 1952. Perayu mendakwa bahawa beliau datang ke Ipoh untuk mencari kerja dan semasa di Ipoh telah bertemu dengan seorang bernama "Man". Menurut perayu lagi, Man memberitahunya bahawa SP6 boleh membantunya mendapat kerja yang berakibat beliau telah menelefon SP6 dengan

harapan SP6 membantunya untuk mendapat kerja. Perayu menyangkal ada membuat tawaran untuk menjual dadah kepada SP6 dan SP7. Beliau juga menyangkal mempunyai pengetahuan tentang dadah yang dijumpai dari beg yang dibawa oleh tertuduh kedua. Hakim Mahkamah Tinggi mendapati perayu bersalah seperti pertuduhan dan atas sabitan menjatuhkan hukuman mati ke atasnya.Tertuduh kedua bagaimanapun dilepas dan dibebaskan. Perayu telah merayu.

Diputuskan (menolak rayuan dan mengesahkan sabitan dan hukuman)
Oleh Azhar Ma'ah HMR menyampaikan penghakiman mahkamah:

(1) Keterangan SP6 telah disokong oleh P7. Semasa pemeriksaan balas SP6, ianya diajukan kepadanya oleh peguam bijaksana perayu bahawa rundingan-rundingan di antara perayu dan SP6 adalah semata-mata berkaitan kemungkinan SP6 mencari kerja untuk perayu dan bukannya mengenai penjualan dadah. Pengataan-pengataan yang diaju kepada saksi-saksi pendakwaan di peringkat pendakwaan oleh pihak pembelaan tidak menjadi keterangan tetapi masih merupakan pengataan semata-mata. Oleh itu, apa yang diajukan kepada saksi SP6 hanyalah satu proposisi yang tidak disokong oleh keterangan dan disangkal dengan jayanya oleh pendakwaan.

(2) Tiada keterangan langsung mengenai sebab-sebab atau motif bagi saksi-saksi pendakwaan mereka-reka cerita untuk memerangkap perayu mahupun tertuduh kedua.

(3) Berdasarkan fakta-fakta yang sudah terbukti, inferens tidak dapat tidak yang boleh dibuat adalah bahawa perayu di sepanjang masa adalah privi kepada transaksi penjualan dadah berkenaan yang dijumpai di dalam beg yang tergalas pada badan tertuduh kedua sewaktu tangkapan. Perayu mempunyai pengetahuan yang diperlukan mengenai sifat barang yang beliau berurusan dengannya dan mempunyai milikan dadah tersebut.

(4) Kanabis seberat 4,934 gram tersebut adalah jauh lebih banyak dari 200 gram. Perayu mempunyai niat untuk menjual dan menyerahkan dadah tersebut kepada SP6 dan SP7, dan penyerahan malah telah dibuat bilamana perayu membawa SP6 dan SP7 berjumpa dengan tertuduh kedua. Apabila SP7 bertanyakan beliau "mana barang?", perayu menunjukkan

kepada tertuduh kedua dan berkata "barang dalam beg". Perayu gagal membangkitkan sebarang keraguan munasabah terhadap kes pendakwaan dan pembelaan beliau hanyalah satu penyangkalan kosong.

Case(s) referred to:
Emperor v. Karimuddi Sheikh AIR 1932 Cal 373 ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 MLJ 121 ***(refd)***
PP v. Muhammed Ali [1962] MLJ 257 ***(refd)***
PP v. Sa'ari Jusoh [2007] 2 CLJ 197 FC ***(refd)***
Wan Marzuki Wan Abdullah v. PP [2008] 4 CLJ 631 CA ***(refd)***
Zulfikar Mustaffah v. PP [2001] 1 SLR 633 ***(refd)***

For the appellant - Kerpal Singh; M/s Jagjit, Kerpal & Sakthi
For the prosecution - Mangaiakarasi Krishnan DPP; AG's Chambers

[Appeal from High Court, Ipoh; Criminal Trial No: 45-1-2002]

Reported by Amutha Suppayah

JUDGMENT

Azhar Ma'ah JCA:

[1] In this case the appellant (the 1st accused) and another by the name of Armiadi (the 2nd accused) were jointly charged in the Ipoh High Court on the following charge:

> Bahawa kamu bersama-sama, pada 2.5.2001 jam lebih kurang 6.30 petang di Lengkok Bercham Timur 4, Taman Pakatan, Bercham, Ipoh di dalam Daerah Kinta di dalam Negeri Perak, telah mengedar dadah berbahaya iaitu cannabis seberat 4,934 gram, oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya 1952 dan dibaca bersama seksyen 34 Kanun Keseksaan.

[2] The High Court judge at the conclusion of the trial found the 1st accused guilty as per charge and upon conviction sentenced him to death whilst Armiadi was found to have successfully cast a reasonable doubt on the prosecution's case and thus was acquitted and discharged. Hence, the appeal.

A **The Prosecution's Case**

[3] The evidence adduced by the prosecution may be briefly summarised as follows:

B **[4]** On 28 April 2001, Det. Sgt. Zainal bin Ahmad (SP6) received information from a source about drug trafficking activity by an Achehnese. SP6 in turn relayed this information to his superior officer, SP8, Chief Inspector Elias Abu Bakar who instructed him to carry out further investigations. Then, on 1 May 2001 at 10pm SPG received a telephone call from someone who identified himself C as "Agus" who informed SP6 that he had obtained SP6's telephone number from the source. "Agus" requested SP6 to meet the source for more information. SP6 understood the information to mean that it was in relation to drug trafficking transaction. About half an hour later SP6 was again contacted by the source, who was his informer D enquiring whether SP6 had been contacted by "Agus". SP6 was further informed by the informer that "Agus" was prepared to sell to SP6 ganja at RM1,700 per kilogram. The source offered to arrange for SP6 and himself to meet "Agus". It was suggested that the meeting take place at a stall near a Petronas Petrol Station at E Simpang Pulai. This arrangement did not however materialise. "Agus" once again called SP6 requesting for a meeting at a restaurant known as "Restoran Teman Anda" ("the said restaurant") at Bandar Baru Bercham, Ipoh, in the later part of the afternoon. No specific time was fixed.

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[5] Upon being informed of this development by SP6, SP8 swung into action. SP8 set up an ambush party comprising of nine police personnel. At a briefing held at SP8's office at 4pm on 2 May 2001, SP6 and Det. Sgt. Busra (SP7) were instructed to play the role of G agents provocateur, while the other members of the raiding party were to effect arrest of the target. While the briefing was in progress, SP6 received another call from "Agus" enquiring as to SP6's whereabout SP6 informed "Agus" that he was ready to leave and to meet him at any time. At about 5pm SP6 and SP7 left H SP8's office for Bandar Baru Bercham in a Kancil motorcar bearing registration No. AEE 4192 driven by SP7. At about 5.30pm they arrived at the said restaurant and seated themselves at one of the tables. About ten minutes later SP6 saw a male person approaching the said restaurant. Suspecting that person to be "Agus", SP6 raised I his hand to catch the man's attention. The man acknowleged him

by nodding his head. The man walked into the restaurant towards SPG's table. They shook hands and SPG introduced himself as "Zul" and SP7 as "Isa". The man introduced himself as "Agus". There were then discussions and bargaining over the price of the drug in question. Agus agreed to reduce the price to RM1,600 per kilogram and informed SP6 that he could only supply 5 kilograms. After they had closed the deal Agus left the table and went outside about 25 feet away from the table to make a telephone call. Agus came inside the said restaurant again and informed SP6 and SP7 "bekalan sudah ada" and requested them to follow him to Flat Taman Pakatan, Bercham, to collect the drugs. The three of them then left for the place in SP7's car guided by Agus. On arrival at Jalan Lengkok Bercham 4, Agus pointed to a male person with a sling bag sitting and leaning against the seat of a parked motorcycle. Agus asked SP7 to stop the car about two feet away from the said motorcycle where the man with the sling bag was. They all then approached this man.

[6] SP7 then asked Agus "mana barang?" To this question Agus responded, "barang berada di dalam bag", pointing out to the bag slung on the male person leaning on the motorcycle. SP7 immediately unzipped the bag that was slung on this man to have sight of the goods. Inside the bag SP7 saw "5 ketulan yang dibaluti plastik lutsinar dan kertas timah". From the smell SP7 suspected that the package inside the bag was ganja. Immediately, SP7 scratched his head as a signal to the other members of the raiding party who had positioned themselves around the vicinity to effect arrest of the target (ie, Agus) and the man leaning on the motorcycle. Upon the raiding party rushing out from their respective hiding positions, SP6 and SP7 bolted and left the scene. SP8 and other members of the arresting team managed to apprehend Agus and the man with the sling bag. On examination of the bag they found that it contained "5 ketulan mampat dibaluti dengan plastik lutsinar dan kertas timah yang disyaki ganja". The arrestees together with the exhibits were taken back to IPK Perak where a police report was lodged. Upon investigation it was discovered that Agus' real name was Mirza Murtala (1st accused) and the person with the sling bag was Armiadi (2nd accused). They were both of Achehnese origin and were identified as both the accused in this case.

[7] The five packages were packed and sent to the chemist for analysis. The chemist Lam Yoke Ching (SP5) confirmed that the five packages contained cannabis having a net weight of 4,934 grams.

Findings Of The Trial Judge

[8] In holding that a *prima facie* case had been made out against the two accused, the learned trial judge *inter alia* gave his reasons as follows:

> Kepada persoalan niat bersama sepertimana pertuduhan terhadap kedua-dua tertuduh (yang harus dibuktikan oleh pendakwaan) Mahkamah ini telah menilai juga keterangan dan keadaan-keadaan yang menjuruskan sehingga keduanya tertangkap bersama dadah berkaitan. Seksyen 34 Kanun Keseksaan telah menggariskan situasi niat bersama ini,
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> > When a criminal act is done by several persons, in furtherance of common intention of all, each of such person is liable for that act in the same manner as if the act were done by him alone.
>
> Daripada keterangan-keterangan dalam kes ini, tangkapan terhadap kedua-dua tertuduh ini bermula dan pertemuan SP6 dengan tertuduh pertama untuk suatu urusan jual beli dadah di restoran berkenaan. Faktor ini disokong oleh SP7 yang mengesahkan berlakunya tawar menawar harga, yang akhirnya ditetapkan dan dipersetujui oleh OKT1. Selepas daripada itu OKT1 telah bangun dan pergi ke hadapan kedai dan telah menalifon seseorang. Selepas 1-2 minit kemudiannya, dia datang semula ke meja di mana SP6 dan SP7 berada. OKT1 kemudiannya telah mengajak SP6 dan SPY pergi ke Flat Taman Pakatan, Bercham.
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> Katanya lagi bekalan sudah ada dan kawannya sedang menunggu di flat tersebut. Dengan pandu arah oleh tertuduh pertama, mereka bertiga OKT1, SP6 dan SP7 telah berkereta dan berlepas ke sana, sampai di tempat kejadian, OKT1 telah menunjukkan ke arah tertuduh kedua sedang menyandar – berdiri pada sebuah motosikal dengan membelakangkan jalan raya di situ. SP7 ada tanyakan kepada tertuduh pertama, "mana barang?"; OKT jawab "barang dalam beg" yang bermaksud barang berada di dalam beg yang digalas oleh OKT2.

Apabila SP7 membuka dan mengesahkan dadah di dalamnya kedua-dua tertuduh telah ditangkap di situ oleh pasukan menangkap polis.

Dengan mengambil kesemua keterangan dan keadaan-keadaan dalam kes ini telah menyebabkan suatu kesimpulan dapat dibuat oleh Mahkamah ini bahawa terdapat satu rancangan terdahulu antara kedua-dua tertuduh. OKT1 jelas sebagai seorang yang berurusan dengan SP6 dan SP7 dan OKT2 pula membawa keluar dadah bagi tujuan penghantaran dadah setelah diberitahu oleh OKT1. Jelas kedua-dua tertuduh mempunyai tujuan yang sama, iaitu untuk tujuan penjualan dan penghantaran bekal dadah kepada penyamar-penyamar sulit polis.

Dalam ertikata lain, walaupun kedua-dua tertuduh mempunyai peranan yang berlainan, tetapi di penghujung perbuatan mereka telah mencapai satu keputusan – untuk menyerahkan dadah yang dirancangkan. Mereka semestinya mempunyai niat bersama di dalam urusan tersebut sepertimana yang digariskan di bawah seksyen 34 Kanun Keseksaan.

The Defence Of The 1st Accused

[9] The 1st accused in his defence on oath testified that he came to Ipoh two weeks prior to the incident for the purpose of looking for a job. Whilst in Ipoh he squatted with a few of his friends who were also from Acheh, at Flat Lama Bercham. It was here that he got acquainted with a man by the name of "Man". "Man", who used to frequent the Flat Lama Bercham, informed the 1st accused that SP6 could probably render some kind of assistance for him to get a job. On that basis he contacted SP6 hoping that SP6 could facilitate in his endeavour to get a job; but somehow things had turned out to be something else. According to the 1st accused when he first met SP6 it was at a restaurant not very far from Flat Lama Bercham. SP6 was with a friend whom SP6 introduced as "Bob". The 1st accused thought Bob was from a construction company. SP6 then requested the 1st accused to contact the 2nd accused to ask the 2nd accused to bring a bag belonging to Man that was left and kept at the 2nd accused's place so that Man could collect it from him later. The 1st accused managed to contact the 2nd accused and arrangement was made for the 2nd accused to deliver the bag at the 1st accused's place at Flat Lama Bercham where the 1st accused and SP6 and SP6's friend SP7 would be waiting. The three of them then left the restaurant for Flat Lama Bercham to meet the 2nd accused to collect the bag from him. They left in the car driven by Bob for Flat Lama Bercham. When they were about

to arrive at the flat the 1st accused saw the 2nd accused riding his motorcycle towards the same direction. The 1st accused waved and signalled the 2nd accused to stop. Both vehicles stopped near a junction of the road leading to the flat. Bob got out of the car and hurriedly approached the 2nd accused. The 1st accused who was seated at the rear passenger seat also alighted from the car intending to go towards the 2nd accused. Before he could go further the 1st accused was ambushed by two Indian men who came on a motorcycle. The pillion rider jumped on the 1st accused and pinned him to the ground. All of a sudden the 1st accused saw several men surrounding him and the 2nd accused. The 1st accused enquired what the matter was, and was told "di balai cakap". The 1st accused was then blindfolded and taken to the balai.

[10] In his defence, the 1st accused denied making any offer to sell drugs to SP6 and SP7 at any time. He also denied any knowledge of the drugs that was recovered from the bag that was carried by the 2nd accused.

[11] We do not propose to state and deal with the 2nd accused's defence which resulted in him being acquitted and discharged by the learned trial judge. There is no necessity to do so as the appeal by the Public Prosecutor against the 2nd accused acquittal order could not proceed due to the absence of the 2nd accused before us.

The Appeal

[12] It was submitted before us that the central issue in this case is whether "MAN" was a fictitious invention of the 1st accused to deflect the charge or was his existence real? The trial judge, it was submitted had fallen into error in finding that the person "MAN" was a mere figment of the 1st accused's imagination invented for the purpose of the trial. To explain this proposition the learned counsel put his argument as follows which we now reproduce:

> SUMBER, it is said gave SP6's mobile number to AGUS (Appellant) to call SP6.
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> Appellant called the number given. Appellant says it was given by his friend MAN. Surely SUMBER would not have given his name as SUMBER to the appellant. And SUMBER had to have a name. What was the name?

When appellant called SP6 he said that the number was given by MAN. Again, surely, it could not have been "your SUMBER gave me the number". A

No matter how the matter is looked at, the inescapable conclusion is that SUMBER is MAN and MAN is SUMBER. MAN is therefore not a fictitious person. B

Evidence was given that MAN spent some nights in the 2nd accused's house. There is therefore compelling reason to hold that the bag (P5A) stuffed with cannabis, was Man's.

[13] In response to the above argument, the learned DPP for the respondent drew this court's attention to the evidence of SP6 which read as follows: C

Saya tak pula mengenali mana-mana orang yang bernama "Man" berkaitan dengan kes ini. "Man" bukan nama sumber saya (dalam kes ini). D

[14] In this connection, the DPP further submitted that there was nothing in the evidence to suggest that SP6 had known the 2nd accused prior to the incident. The 2nd accused's own evidence made no mention about him knowing SP6 prior to that fateful date. This, according to the learned DPP negated the 1st accused's claim in his evidence that SP6 had asked the 1st accused to make a telephone call to the 2nd accused to ask him to bring Man's bag that was left at 2nd accused's house and to be handed over to the 1st accused at Flat Lama Bercham. It was submitted further that the 1st accused's story with regard to the ownership of the bag P5A was a mere concoction. It follows that the suggestion that "Man" was the owner of the bag P5A is untenable. It was submitted further that the evidence of SP6 supported the testimony of SP7 that on the evening of 2 May 2001 at the meeting in the restaurant, the 1st accused negotiated with SP6 on the sale of cannabis wherein the 1st accused finally agreed to sell 5 kilograms of the drugs at a price of RM1,600 per kilogram. E F G

Decision H

[15] The starting point of our evaluation of the 1st accused's appeal is whether the person by the name of "Man" really existed, or could it be a mere figment of the 1st accused's imagination created for the purpose of this trial. If the answer to this is in the I

affirmative, the next question to be asked is whether the said 'Man' was the owner of the offending drugs in P5A. The trial judge in discerning this crucial issue in his judgment had this to say:

> OKT1 telah mengajukan pembelaannya dengan mengatakan yang tujuan dia berjumpa SP6 dan SP7 adalah sekadar pertemuan meminta pertolongan mendapatkan pekerjaan kepadanya melalui jasa baik SP6 dan SP7 setelah 'Man' (kononnya kawan OKT1) memaklumkannya SP6 boleh hulurkan pertolongan. Tetapi ujar OKT1, pertemuan itu telah bertukar kepada suatu suasana lain kemudiannya di mana katanya, SP6 telah seolah-olah memaksanya menghubungi OKT2 membawa keluar beg 'Man' yang berada di rumah OKT2. Ujarnya lagi, OKT2 telah membawa beg yang SP6 maksudkan itu ke Flat Lama Bercham. OKT1 dan kedua ditangkap di situ bersama-sama beg mengandungi dadah yang sedang digalas oleh tertuduh kedua di tempat kejadian.
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> Semasa menjawab soalan-soalan Timbalan Pendakwa Raya di sesi pemeriksaan balas, OKT1 mengatakan yang dia baru 2 minggu datang ke Ipoh dan masih tidak mempunyai pekerjaan. Dia hanya mempunyai taraf pelajaran setakat sekolah menengah rendah di Acheh, Indonesia. Masuk ke Malaysia melalui paspot dan mendapat pas lawatan sahaja.
>
> Kepada Mahkamah alasan tujuan pertemuan OKT1 dengan SP6 bagi mendapat kerja (versi pembelaannya) boleh dikatakan sebagai suatu yang direka-reka olehnya. Ini kerana dari keterangannya sendiri, dia mengatakan bahawa dia baru sampai di Ipoh dan menumpang tinggal dan makan minum dengan kawan-kawan di flat Bercham itu tanpa sebarang pekerjaan. Dia mengharapkan untuk bekerja tetapi masuknya ke Malaysia melalui pas lawatan sahaja dan dia tidak kemukakan apa-apa permit untuk kerja. Lagi pun apalah yang dia beriya-iya sangat untuk bertemu dengan orang tempatan yang tidak dikenalinya bagi mencarikannya pekerjaan tanpa sebarang kelulusan atau kemahiran tertentu. Sedangkan kesemua kawan-kawannya termasuk OKT2 sendiri pun bekerja di sektor pembinaan. OKT1 sendiri pun boleh ke tempat kerja kawan-kawannya bagi mendapatkan pekerjaan di sana. Mahkamah ini merasakan OKT1 berbohong tentang tujuan sebenar pertemuannya dengan SP6 dan SP7 selepas Mahkamah ini menerima keterangan kedua-dua SP6 dan SP7 tanpa sebarang keraguan dan Mahkamah dibenarkan untuk menerima keseluruhan keterangan dari penyamar-penyamar sulit (agent provocateur). (Sila rujuk seksyen 40A Akta Dadah Berbahaya 1952).

> Mahkamah ini merasakan yang OKT1 juga telah berbohong dalam pembelaannya. Dia seolah-olah memberitahu bahawa walaupun SP6 mengenali 'Man' dan mengetahui tentang beg bersama dadah kepunyaan 'Man' tetapi masih juga memaksa, memerangkap dan menangkap OKT1 dan OKT2. Mahkamah ini tidak dapat menerima tentang berlakunya penganiayaan ke atas kedua-dua tertuduh ini oleh SP6. Ini kerana tidak ada sebab untuk SP6 dan SP7 berbuat demikian, lagi pun pihak-pihak dalam kes ini baru pertama kali berjumpa dan sudah semestinya tiada sebarang latar belakang dendam atau perselisihan antara mereka.

[16] It is clear from the above passage that although there were no specific findings by the trial judge as to the existence of the 1st accused's friend by the name of 'Man' whom the 1st accused alleged had given him SP6's mobile number, the judge had rejected the 1st accused's defence that 'Man' was the actual owner of the drugs in question, and that the 2nd accused was an innocent carrier.

[17] We could find no reason to disagree with the trial judge. We would add that the evidence of SP6 established that the whole episode of the transaction started off when the 1st accused telephoned SP6 requesting SP6 to call the source who would then tell SP6 everything. By this, it was understood by SP6 that it must be about a drug transaction. Subsequent to that there were more calls from the 1st accused who wanted to meet SP6. Finally, they agreed to meet at a restaurant called Restoran Teman Anda. At the meeting SP6 was accompanied by a colleague, SP7. The three of them, after discussions, the 1st accused agreed to supply 5 kilograms of ganja at a price of RM1,600 per kilogram.

[18] This evidence of SP6 was corroborated by SP7. In the cross-examination of SP6 it was put to him by learned counsel for the 1st accused that the discussions which the 1st accused had with SP6 was solely on the possibility of SP6 finding a job for the 1st accused and not about selling of drugs. With regard to this we are conscious of the trite principle of law that suggestions made to the prosecution's witnesses at the prosecution's stage by the defence are not evidence and remains mere suggestions – see *PP v. Dato' Seri Anwar bin Ibrahim (No. 3)* [1999] 2 MLJ 121 approving *Emperor v. Karimuddi Sheikh* AIR [1932] Cal 373. Hence, we are of the view that what was put to the witness SP6 was just a proposition unsupported by evidence and successfully refuted by the prosecution.

[19] The other aspect of the defence story that needs to be addressed is the suggestion by the 1st accused that his arrest together with the 2nd accused and the finding of the incriminating drugs was a frame up. Having been put in a situation where the court was presented with two divergent versions of the episode leading to the arrest of the two accused and recovery of the offending drugs in question, the trial judge had apparently adopted the principle laid down by Thomson CJ in *PP v. Muhammed Ali* [1962] MLJ 257. In that case the learned Chief Justice said:

> When a police witness says something that is not inherently impossible his evidence must be in the first instance be accepted. If his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent probability the evidence of any witness, whether police witness or not, who gives evidence on affirmation, should normally be accepted.

[20] Our appraisal of the aforesaid approach taken by the trial judge is further fortified by the following passage found in his judgment that read:

> Mahkamah ini merasakan yang OKT1 juga telah berbohong dalam pembelaannya. Dia seolah-olah memberitahu bahawa walaupun SP6 mengenali 'Man' dan mengetahui tentang beg bersama dadah kepunyaan 'Man' tetapi masih juga memaksa, memerangkap dan menangkap OKT1 dan OKT2. Mahkamah ini tiada dapat menerima tentang berlakunya penganiayaan ke atas kedua-dua tertuduh ini oleh SP6. Ini kerana tidak ada sebab untuk SP6 dan SP7 berbuat demikian, lagi pun pihak-pihak dalam kes ini baru pertama kali berjumpa dan sudah semesti tiada sebarang latar belakang dendam atau perselisihan antara mereka.

[21] We are in agreement with the learned trial judge and we further of the view that in fact there is no evidence whatsoever at all of any reason or motive for the prosecution's witnesses aforesaid to frame up the 1st accused nor the 2nd accused.

[22] Having dealt with the issue of divergence of factual versions of the prosecution's case and the defence story, there remain the issue of law to be addressed by this court. The starting point in the consideration of this issue is the question of possession. In *Zulfikar Mustaffah v. PP* [2001] 1 SLR 633 at p. 639, it was said that:

> For the element of "possession" ... to be established it must not only be shown that the accused had physical control of the drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as to what he was carrying.

[23] Applying the factual matrix of this case on appeal before us, the irresistible inference that may be drawn on the proved facts was that the 1st accused all along was privy to the transaction of the sale of the drugs in question that was found in the bag slung on the body of the 2nd accused at the time of the arrest. On the proven facts, we are also satisfied that the 1st accused had the requisite knowledge of the nature of the substance that he was dealing with. Hence, we agree with the learned trial judge that the 1st accused was in possession of the incriminating drugs, the subject matter of the charge.

[24] In this case the subject matter of the charge is cannabis weighing 4,934 grams which is well in excess of 200 grams. The learned trial judge had made a finding of fact that the first accused had the intention to sell and deliver the said drugs to SP6 and SP7, which he in fact delivered when he brought SP6 and SP7 to see the second accused. When SP7 asked him, "mana barang?", the first accused pointed to the second accused and said, "barang dalam beg". The learned trial judge concluded that the first accused had not raised any reasonable doubt on the prosecution's case and that his defence was a mere denial.

[25] In *PP v. Sa'ari Jusoh* [2007] 2 CLJ 197 the Federal Court at p. 420 held:

> A sale is therefore complete upon transfer of the property in the goods even though the price has not been paid. A sale in this sense cannot therefore be described as an act preparatory to the sale or as negotiations leading to the sale or even as an agreement for a sale.

[26] The said case was referred to by this court in *Wan Marzuki Wan Abdullah v. PP* [2008] 4 CLJ 631. Gopal Sri Ram JCA, in delivering the judgment of this court, at p. 635 said:

A In our judgment whether there is actual delivery is a question of fact and of degree. It depends on the particular facts of an individual case. Varying fact patterns may be envisaged. An accused (as vendor) may physically hand the drug to the buyer (usually an agent provocateur). Or he may place it near the buyer. Or he may make it readily available for the buyer to take control of it as happened B in *Sa'ari Jusoh*. Or he may place it in a vehicle or a room and hand the keys to the same to the buyer. In all these cases there is actual delivery. There may be cases where delivery is constituted by more than one act. Take this very case. The acts of the appellant in bringing the drug to the petrol station and placing it near PW5 C when taken cumulatively constitute actual delivery.

[27] We agree with the finding of fact by the learned trial judge and his assessment of the first accused's defence. Thus, we hereby unanimously dismissed the first accused's appeal and affirmed the D conviction and sentence passed by the trial judge.

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